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No. 96-1653

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOE OMORODION OSAREN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in declining to order the Board of Immigration Appeals to change the time allowed for petitioner to depart voluntarily from the United States in lieu of deportation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 105 F.3d 656 (Table). The opinions of the Board of Immigration Appeals (Pet. App. 6-12) and the immigration judge (Pet. App. 13-22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1996. A petition for rehearing was denied on February 25, 1997. Pet. App. 3-4. The petition for a writ of certiorari was filed on April 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a native and citizen of Nigeria, entered the United States as a student in December 1984. Pet. App. 7, 13. In January 1994, the Immigration and Naturalization Service (INS) initiated deportation proceedings against petitioner under former Sections 241(a)(1)(B) and 241(a)(1)(C)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1)(B) and 1251(a)(1)(C)(i) (1994), on the ground that he had stayed in the country beyond the period authorized and had otherwise violated the conditions of his entry visa. Pet. App. 6-7, 13.

Petitioner admitted the truth of the INS's factual allegations and conceded deportability, but he requested discretionary relief in the form of suspension of deportation under former Section 244(a) of the INA, 8 U.S.C. 1254(a) (1994), or, in the alternative, the opportunity to depart the United States voluntarily, under former Section 244(e)(1), 8 U.S.C. 1254(e)(1) (1994), rather than be deported. Pet. App. 13-14. In June 1995, after an evidentiary hearing, an immigration judge (IJ) found that petitioner had failed to establish that his deportation would give rise to the "extreme hardship" required to make him statutorily eligible for suspension of deportation. *Id.* at 14, 21; see 8 U.S.C. 1254(a)(1) (1994). The IJ also denied petitioner's request for voluntary departure. Pet. App. 21-22.

The Board of Immigration Appeals (BIA) upheld the IJ's decision that petitioner had not demonstrated eligibility for suspension of deportation. Pet. App. 6-12. While it recognized (as had the IJ) that deportation would of course cause some hardship, the Board "agree[d] that the record fail[ed] to establish extreme

hardship to [petitioner] or to a qualifying relative within the meaning of the [INA]." *Id.* at 9. The Board also agreed with the IJ that petitioner was statutorily eligible for voluntary departure; and, unlike the IJ, the Board found "no evidence which would preclude a grant of such relief as a matter of discretion." *Id.* at 11. The Board therefore sustained petitioner's appeal on that point, and ordered that petitioner be "permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director." *Id.* at 12. If petitioner failed to depart voluntarily within the time allowed, he was to be deported. *Ibid.*

Petitioner sought review of the Board's decision in the court of appeals, under the provision for such review contained at that time in Section 106(a) of the INA, 8 U.S.C. 1105a(a) (1994). In a brief per curiam opinion (Pet. App. 1-2), the court affirmed the Board's disposition of the case, observing (*id.* at 2) that petitioner "received a full and fair opportunity to develop his claim of 'extreme hardship' before the Attorney General's delegate." With respect to voluntary departure, the court simply stated (*ibid.*) that petitioner's "request that we order the BIA to change his voluntary departure date is DENIED," citing *Faddoul* v. *INS*, 37 F.3d 185 (5th Cir. 1994).

ARGUMENT

1. At the time petitioner was found to be deportable, Section 244(e) of the Immigration and Nationality Act, 8 U.S.C. 1254(e) (1994), permitted the Attorney General, in her discretion, to allow any deportable alien who met certain basic qualifications to depart voluntarily from the United States in lieu of

deportation. The Attorney General delegated that authority to immigration judges and the Board of Immigration Appeals in the first instance, and she committed decisions to reinstate or extend the time for voluntary departure in most cases to the "sole jurisdiction" of the INS's various district directors. 8 C.F.R. 244.1-244.2 (1997), revised and renumbered as 8 C.F.R. 240.56-240.57 (62 Fed. Reg. 10,377 (Mar. 6, 1997)). As petitioner observes (Pet. 9), one principal advantage of voluntary departure, from the point of view of a deportable alien, was that it avoided application of the five-year bar imposed by former Section 212(a)(6)(B) of the INA, 8 U.S.C. 1182(a)(6)(B) (1994), on reentry by deported aliens without the specific consent of the Attorney General.

2. Petitioner argues (Pet. i, 5-10) that an alien should not be forced to choose between seeking judicial review of an order of deportation and taking advantage of a grant of voluntary departure that may expire before review has been completed. Even if petitioner had been put to that choice, his claim would be insubstantial. An alien who has been found to be deportable has no right to voluntary departure, and a choice between taking advantage of that discretionary benefit (on the terms on which it is offered) and pursuing additional legal process as of right (at the end of which the government might prove less accommodating) is little different from the choice that routinely faces criminal defendants in deciding whether to enter into a plea agreement with the government. See *Castaneda* v. *INS*, 23 F.3d 1576, 1581-1582, on denial of reh'g, 33 F.3d 44 (10th Cir. 1994); compare *Brady* v. *United States*, 397 U.S. 742, 749-753 (1970). Congress has committed the decision whether, and on what conditions, to grant voluntary

departure to an eligible alien to the discretion of the Attorney General, and a reviewing court has no authority to extend or reinstate a voluntary departure order that has expired by its terms. See *Castaneda*, 23 F.3d at 1583.

In fact, petitioner was not put to the choice that he posits. As petitioner points out (Pet. 7, 10-11), the Fifth Circuit has asserted the right to review a decision by the BIA not to grant an alien's request, in deportation proceedings, to specify a voluntary departure period that would expire within a specified time after the resolution of any appeal. *Faddoul* v. *INS*, 37 F.3d 185, 191-193 (1994). Petitioner represents (Pet. 4, 11) that he made such a request to the BIA, which instead granted his request for voluntary departure, but only for a period "within 30 days from the date of this order or any extension beyond that time as may be granted by the district director" (Pet. App. 12). Petitioner sought review of that decision in the court of appeals, which specifically refused to alter the departure date specified by the BIA. *Id.* at 2. In those circumstances, the proper inference is not, as petitioner contends (Pet. 10-11), that the court of appeals "[d]eclined [t]o [r]eview" the Board's decision, but that it found no reason to extend the voluntary departure period granted by the Board.

Finally, we note that petitioner does not allege that he has requested reinstatement or extension of the time for his voluntary departure from the INS district director, or that the district director has denied any such request. Having enjoyed a stay of deportation pending appeal, under former Section 106(a)(3) of the INA, 8 U.S.C. 1105a(a)(3) (1994), and having obtained a stay of the court of appeals' mandate pending the disposition of this petition (Pet. App. 5;

see Fed. R. App. P. 41(b)), petitioner has, to date, faced no immediate danger of deportation. While petitioner cannot, at this point, plausibly contend that he requires any substantial additional amount of time to wind up his affairs in the United States, there is no reason to assume that the appropriate INS district director would deny a timely request by petitioner for reinstatement of a brief period of voluntary departure.*

3. As petitioner points out (Pet. 5-9), the courts of appeals adopted different approaches to reviewing deportable aliens' requests for judicial orders reinstating or extending the time for voluntary departure accorded them under former Section 244(e) of the INA, 8 U.S.C. 1254(e) (1994). Some courts correctly held that they lacked jurisdiction to reinstate or extend an administrative grant of voluntary departure under that provision. See, *e.g.*, *Nkacoang* v. *INS*, 83 F.3d 353, 356-357 (11th Cir 1996); *Castaneda*, 23 F.3d at 1578-1583 (reviewing cases). Other courts asserted jurisdiction to reinstate or extend such a grant under varying circumstances. See, *e.g.*, *Faddoul*, *supra*; *Ramsay* v. *INS*, 14 F.3d 206, 211-213 (4th Cir. 1994) (while decision should "usually" be left to district director, court will extend where INS does not suggest any reason for district director to deny reinstatement apart from alien's decision to appeal);

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* That decision would, of course, rest solely in the discretion of the district director, and we make no representation that such a request would be granted. Our point is simply that petitioner offers no reason to believe that district directors routinely refuse to reinstate or extend the time for voluntary departure for otherwise eligible aliens simply because they have sought judicial review. See *Kaczmarczyk* v. *INS*, 933 F.2d 588, 598 (7th Cir.), cert. denied, 502 U.S. 981 (1991).

Contreras-Aragon v. *INS*, 852 F.2d 1088 (9th Cir. 1988) (en banc) (period for voluntary departure does not begin to run until issuance of court of appeals' mandate affirming BIA's order). In this case, as noted above, the court of appeals evidently did review the time limit imposed by the BIA for voluntary departure (see Pet. App. 2, citing *Faddoul*), and the divergence in approach that he identifies is therefore of limited relevance here. To the extent, however, that petitioner might have received even more favorable treatment in some other circuit, recent statutory changes have deprived the issue of any continuing importance.

On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Section 309(c)(4)(E) of IIRIRA, 110 Stat. 3009-626, provides that, in judicial review of any final order of deportation entered on or after October 31, 1996, "there shall be no appeal of any discretionary decision under section * * * 244" of the INA (as in effect on the date of IIRIRA's enactment). Because former Section 244(e) conferred the authority for grants of voluntary departure, IIRIRA settles, prospectively, any dispute about a court of appeals' authority to review or alter the BIA's exercise of the Attorney General's discretion in that regard.

In addition, Section 308(b)(7) of IIRIRA, 110 Stat. 3009-615, repeals former Section 244 in its entirety, as part of a general revision of the provisions relating to deportation (now referred to as "removal"). Former Section 244(e) has been replaced with a new Section 240B of the INA, to be codified at 8 U.S.C. 1229c, providing for the discretionary grant of volun-

tary departure under certain circumstances. See IIRIRA § 304(a)(3), 110 Stat. 3009-596. New Section 240B(f), to be codified at 8 U.S.C. 1229c(f), specifies that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure" entered at the conclusion of removal proceedings; and new Section 242(a)(2)(B), to be codified at 8 U.S.C. 1252(a)(2)(B), reiterates that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 240B." See IIRIRA § 306(a)(2), 110 Stat. 3009-607.

Neither IIRIRA's preclusion of judicial review of decisions under old Section 244(e) nor its new provisions concerning voluntary departure apply to petitioner's case, because the administrative deportation proceedings against petitioner were commenced and concluded before October 31, 1996. See IIRIRA § 309(a) and (c), 110 Stat. 3009-625. In light of the statutory changes and jurisdictional clarifications enacted by IIRIRA, however, the issue that petitioner seeks to raise in this case is of no continuing importance and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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